- **1(A)(2) PUBLIC BODY – COMMITTEE REQUIRED BY COUNTY EXECUTIVE REGULATION**
- **1(C)(3) ADMINISTRATIVE FUNCTION EXCLUSION – OUTSIDE EXCLUSION, SELECTION OF CONTRACTOR**
- **1(J) QUASI-LEGISLATIVE FUNCTION – SELECTION OF CONTRACTOR**
- **2(A) NOTICE – FAILURE TO PROVIDE: VIOLATION**

***Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at** https://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

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June 30, 2016

Re: Rock Creek Forest Childcare Selection Committee
John Cumings, *Complainant*

Complainant John Cumings alleges that the Rock Creek Forest Childcare Selection Committee violated the Open Meetings Act when it met on April 6, 2016, without inviting the public to attend. The principal of the Rock Creek Forest Elementary School appointed the committee in January 2016 to conduct the competitive selection process for the provision of childcare services before and after the school day at the school. She announced the formation of the committee and announced that it would meet on April 6. However, the announcement did not invite the public to attend and did not specify the time and place of the meeting. Complainant asserts that the committee is a "public body" as defined by § 3-101(h) of the Act[1] and therefore subject to the Act, and that the notice given by the principal was inadequate because it did not provide the information required by the Act.[2] He states that the committee made its selection on April 6.

[1] Statutory citations are to the General Provisions Article of the Maryland Annotated Code (2014, with 2015 supp.).

[2] Section 3-302(b) provides that meeting notices "shall . . . include the date, time, and place of the session."

The Montgomery County Office of Law responded on the committee's behalf. The response provides us with the regulations pertinent to the creation of childcare selection committees but does not directly address the question of whether this committee was a "public body" subject to the Act. The submissions show that, although the principal appoints the members of the committee and was a member of it, she did not create it, and Montgomery County's school system does not staff it. The committee was instead created under a county regulation, and it was staffed by a county office. The response asserts that the committee was performing an "administrative function" on April 6 and that the meeting was therefore exempt from the Act. *See* § 3-103(a)(1)(ii). It is our understanding that the committee has fulfilled its purpose and no longer exists.

If the Act applied, the committee violated it; the response properly does not argue that the notice contained the required information. Thus, the questions before us are whether the committee was a "public body" subject to the Act, and, if so, whether the April 6 meeting fell within the Act, or instead was an "administrative function" meeting, not subject to the Act.

The Act defines the term "public body" in several ways, but, here, we need only apply the provision that defines a multi-member entity as a "public body" if it has been created by any of the legal instruments listed in § 3-101(h)(1)(ii). The list includes legal instruments such as laws, resolutions, and bylaws; it also includes an "executive order of the chief executive authority of a political subdivision." § 3-101(h)(1)(ii)(6), (8). The particular instrument need not create the public body by name; the Court of Appeals has deemed that when a rule requires a multimember body to perform a particular function, the entity is created by the rule for purposes of the Act. *See Avara v. The Baltimore News American*, 292 Md. 543 (1982) (holding that a joint conference committee in the General Assembly, created pursuant to a rule that required the appointment of such committees in certain circumstances, was a "public body"). [3]

Here, Executive Regulation Number 15-14AMV, issued by the County Executive, sets forth a competitive selection process for the selection of childcare providers to provide services in public schools facilities. Under the regulation, each school facility designated for those services is subject to the selection process at least every seven years or when a vacancy occurs. Either way, the regulation requires a particular county office to notify the school principal that the selection process must begin. The school principal must then give public notice that the competitive selection process has begun, and she must appoint a selection committee. The county school board, an

[3] For a discussion of *Avara* and Compliance Board opinions that have addressed committees deemed to have been created by a law or other legal instrument, see Open Meetings Act Manual 5-6 (2015).

entity separate from the county, approved the regulation by resolution. In short, the regulation mandated the creation of the committee, and the committee was therefore a public body subject to the Act.

The next question is whether the committee performed an administrative function when it met to consider the proposals submitted by offerors of child care services. The Act defines "administrative" function by what it is, § 3-101(a), and by what it is not. § 3-101(b). *See also* Open Meetings Act Manual 17-19 (explaining the exclusion and summarizing our opinions). It *is* the "administration" of a law or regulation. § 3-101(a). Here, the executive regulation lists the selection criteria in such detail that the committee likely is "administering" the regulation when it considers competing proposals. The necessary second step, however, is to apply the § 3-101(b) definition of what an administrative function is not. Among other things, it is not one of the other "functions," which include the "quasi-legislative" function. The Act defines that term, too. As relevant here, the quasi-legislative function includes the "process or act of approving, disapproving, or amending a contract." § 3-101(j)(3). We conclude that selecting a contractor is part of the "process" of approving a contract, that the committee's discussion about which provider to select did not fall within the administrative exclusion, and, therefore, that the Act applied to the April 6 meeting.

We will briefly address the committee's argument about the difficulty of conducting a competitive selection process in the open, given the fact that the childcare service offerors must submit confidential information to the committee. The General Assembly recognized such difficulties when it enacted § 3-305(b)(13), which permits a public body to close a meeting when a statutory provision prevents public disclosure about a matter, and § 3-305(b)(14), which permits a public body to discuss the contents of a bid or proposal in closed session if a public disclosure would adversely impact the public body's ability to participate in the competitive bidding process. To close a meeting under an exception, a public body must first give notice of a public session and vote to close it, and its presiding officer must prepare a written statement. *See* § 3-305(d); *see also* Open Meetings Act Manual 22 (sample language for notice of a meeting that will be closed but for the initial vote), and Chapter 5 (conditions for closing a meeting). While we do not suggest that everything discussed by a childcare selection committee will fall within these exceptions, they may address the concerns addressed in the response.

In conclusion, we find that the committee and its April 6 meeting were subject to the Act and that the committee violated the Act when it did not publish a notice that invited the public to attend.

Open Meetings Compliance Board

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